### **U.S. Department of Labor**

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Issue Date: 24 February 2003

Case No. 2002-LHC-533 OWCP No. 10-39334

In the Matter of:

LARRY A. SHIMMIN,

Claimant,

v.

FRASER SHIPYARDS,

Employer,

and

SIGNAL MUTUAL INDEMNITY ASSOCATION,

and

WAUSAU INSURANCE COMPANY,

and

AMERICAN INTERNATIONAL SPECIALTY LINES INSURANCE COMPANY (AIG),

anc

AMERICAN HOME INSURANCE COMPANY (AIG),

and

NATIONAL UNION FIRE INSURANCE COMPANY (AIG),

and

TRAVELERS PROPERTY AND CASUALTY CORPORATION/AETNA,

Carriers.

and

DISTRICT DIRECTOR, OFFICE OF WORKERS'

COMPENSATION PROGRAMS,

Party-in-Interest.

APPEARANCES<sup>1</sup>:

Dennis Cochrane, Esq. (Claimant)

Superior, Wisconsin

<sup>&</sup>lt;sup>1</sup>The Director, Office of Workers' Compensation Programs did not appear at and was not represented by counsel at the hearing.

Christopher J. Field, Esq. (Employer/Signal) South Amboy, New Jersey

Foster P. Nash, III, Esq. (Employer/AIG) New Orleans, Louisiana

Timothy B. Guillory, Esq. (Employer/Travelers) Metairie, Louisiana

Philip R. Brehm, Esq. (Employer/Wausau) Green Bay, Wisconsin

#### **DECISION AND ORDER - IDENTIFYING RESPONSIBLE CARRIER**

This case arises from a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901, et seq. ("LHWCA" or "the Act").

On November 29, 2001, this case was referred to the Office of Administrative Law Judges by the Office of Workers' Compensation Programs for a hearing. Following proper notice to all parties, a formal hearing in this matter was held before the undersigned on September 25, 2002 in Duluth, Minnesota. All parties were afforded full opportunity to present evidence as provided in the Act and the Regulations issued thereunder and to submit post-hearing briefs.

The findings of fact and conclusions of law set forth in this Decision and Order are based on my analysis of the entire record. Each exhibit and argument of the parties, although perhaps not mentioned specifically, has been carefully reviewed and thoughtfully considered. References to ALJX. 1-9, CX 1-15, SX 1-5, AX 1-9, TX 1, WX 1, and JX 1-9 pertain to the exhibits admitted into the record and offered by the Administrative Law Judge, the Claimant, Signal, AIG, Travelers, Wasau, and joint exhibits respectively. The Transcript of the hearing is cited as Tr. followed by page number.

## **Stipulations**

At the hearing, the parties submitted the following stipulations (Joint Exhibit 1).

- 1. The parties are subject to the Longshore and Harbor Workers' Compensation Act (33 U.S.C. §901 *et seq.*) as extended by the Defense Base Act.
- 2. The Claimant and the Employer were in an employee-employer relationship at the time of the accident/injury;
- 3. The accident/injury arose out of and in the scope of employment;
- 4. The Claimant became aware of the occupational disease on September 20, 2001;
- 5. The occupational disease became manifest to Employer on September 20, 2001;

- 6. Employer was timely notified of the injury;
- 7. Claimant filed a claim for compensation (form LS-203) with the United States Department of Labor on October 24, 2001;
- 8. Claimant filed a timely notice of claim;
- 9. Employer filed a notice of controversion on February 26, 2001; Signal filed a timely notice of controversion on September 24, 2001; AIG filed a timely notice of controversion on December 3, 2002; Wausau filed a timely notice of controversion on January 7, 2002;
- 10. Employer has paid Claimant temporary total disability from May 28, 2002 to the present at the weekly rate of \$763.83.
- 11. Claimant's "usual employment" was that of a general foreman at a shipyard, whose duties included exterior and interior repair work on vessels;
- 12. Claimant has not returned to work since May 28, 2002;
- 13. All reasonable and necessary medical payments have been paid by Employer;
- 14. Claimant's average weekly wage at the time of the accident/injury was \$1,145.74; Claimant's hourly rate was \$21.05;
- 15. For a one-year period immediately prior to the accident/injury, Claimant was a five day-per-week worker;
- 16. Claimant has demonstrated a causal relationship between his disability and his work accident. Therefore, he has invoked the presumption of causation contained in Section 20(a).
- 17. The determination of whether Claimant is temporarily or permanently totally disabled shall be reserved.

### **Issues**

The sole issue in this case is:

1. Which carrier is responsible for providing compensation to Claimant for his asbestos-related disability;

Based upon a thorough analysis of the entire record in this case, with due consideration accorded to the arguments of the parties, applicable statutory provisions, regulations, and relevant case law, I hereby make the following:

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

An Administrative Law Judge is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner when determining whether the employee has sustained an injury compensable under the LHWCA. *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459 (1968), *reh. denied*, 391 U.S. 929 (1969). The claimant bears the ultimate burden of persuasion by a preponderance of the evidence. 5 U.S.C. § 556(d).

## **Background**

Larry Shimmin ("Claimant") was born on December 15, 1942. He resides with Sharon Shimmin, his wife of nineteen years, in Duluth, Minnesota. Claimant served in the United States Navy from 1960 to 1964 as a boiler technician. He began smoking one to two packs of cigarettes per day in 1961 until he quit smoking in September of 1985. Claimant was initially hired by Fraser Shipyards ("Employer") on November 11, 1966. He left Employer and opened a sporting goods store with his brother, where he worked from 1967 until 1973. When the sporting goods store closed, he was re-hired by Employer on December 12, 1973. Claimant worked continuously for Employer until May 28, 2002.

# Workers' Compensation Insurance Coverage Periods

Wausau Insurance Companies ("Wausau") provided coverage to Employer until September 4, 1977. (Wausau Post-Trial Brief). Aetna Casualty & Surety Corporation ("Travelers") provided coverage to Employer from February 1, 1980 until May 31, 1996. (JX 6). National Union Fire Insurance Company ("AIG") provided coverage from May 31, 1998 to May 31, 1998. (JX 6). American Home Assurance Company ("AIG") provided coverage from May 31, 1998 to May 31, 2000. (JX 6). American International Specialty Lines Insurance Company ("AIG") provided coverage from May 31, 2000 to May 31, 2001. (JX 6). Signal Mutual Indemnity Association ("Signal") has provided continuous coverage to Employer since May 31, 2001. (JX 6).

### Medical Evidence

Claimant began to have noticeable breathing problems in February 2001. (Tr. 53). His treating physician, Steven Long, M.D., discovered that Claimant's left lung had collapsed on August 30, 2001. (JX 3). Claimant was sent immediately to the emergency room of St. Luke's Hospital, where he presented to pulmonologist Peter Franklin, M.D. on August 31, 2001. Claimant was complaining of a five month history of dry cough and shortness of breath. Dr. Franklin detected diminished breath sounds in Claimant's left lung, and he was concerned with the possibility that Claimant may have a tumor after viewing a large left pleural effusion on a chest x-ray. He performed a thoracentesis and sent a portion of the drained chest fluid for cytology. Dr.

Long referred Claimant to Mary Boylan, M.D. for a possible lung biopsy. Dr. Boylan evaluated Claimant on September 11, 2001 and performed a thoracoscopy. On September 13, 2001, Donald Kundel, M.D. issued an anatomical pathology report analyzing the results of the thoracoscopy. Dr. Kundel favored a diagnosis of mesothelioma. Thomas Colby, M.D. issued a final pathology report on September 15, 2001, diagnosing a malignant tumor most consistent with mesothelioma consistent with asbestos exposure. Claimant was informed of the final diagnosis of malignant mesothelioma on September 20, 2001. (Tr. 26, 53).

## Asbestos Exposure

Claimant was exposed to asbestos in the course of his employment with Employer. He started out as a helper, then he became a boilermaker. His duties as a helper and boilermaker involved boiler repair, the conversion of vessels from coal burning to oil burning, cutting vessels for scrap, and general repair work. The majority of his exposure to asbestos occurred from 1973 to 1988. Claimant testified that he was exposed to asbestos when removing insulation surrounding pipes, from the insulation in the boiler refractory, and when he scrapped ships.<sup>2</sup> He became a temporary foreman in 1982. (Tr. 43). He was responsible for supervising crews, but, if there was a labor shortage, he would perform the work. Employer instituted a respirator program in 1988, and fitted all employees, including Claimant, with a respirator. (Tr. 44). At the same time, Employer began hiring asbestos removal contractors to remove any asbestos containing materials. (JX 2). After his promotion to general foreman in 1989, Claimant was aboard vessels on a regular basis in a supervisory capacity. (Tr. 43). He was responsible for obtaining samples of materials suspected of containing asbestos to send out for analysis. He did not generally wear a respirator or mask whenever he boarded a vessel. He only wore one if he knew the nature of the job involved asbestos. (Tr. 46). At his deposition, Claimant stated that he wore a respirator when working around asbestos at all times since 1988. (JX 2). He also testified at his deposition that he has not performed work around asbestos without wearing a respirator or mask since 1988; in accordance with the strict policy of Employer. (JX 2). Claimant was routinely provided with bulk asbestos analysis reports regarding material samples taken from ships in Employer's shipyard between 1993 and 1998. Numerous samples contained asbestos. (JX 2).

Claimant testified at the hearing and at his deposition that he was last exposed to asbestos in April of 2001, after an electrician disturbed some material on the steamer Calloway. (Tr. 49; JX 1). Claimant and a representative from Envirobate, Employer's current asbestos removal contractor, went to the steamer. Claimant recalls putting on a mask. They removed samples of the material. Testing revealed that the material contained asbestos. Envirobate's Daily Time Logs show that it performed work on the Calloway from February 20, 2001 through April 17, 2001. (JX 9). The Daily Time Logs contain multiple references to a person named "Larry" from Fraser who showed the Envirobate employees what areas to clean-up. (JX 9). On February 27, 2001 alone, Envirobate removed 15 bags of debris from the Calloway. (JX 9). Twin Ports

<sup>&</sup>lt;sup>2</sup>Class 1 asbestos work - the most potentially hazardous of asbestos jobs - involves the removal of thermal system insulation and sprayed-on or troweled-on surfacing asbestos containing materials. Thermal system insulation includes asbestos-containing materials applied to pipes, boilers, tanks, and ducts. *See Asbestos Standard for the Shipyard Employment Industry*, U.S. Department of Labor, Occupational Safety and Health Administration, OSHA 3145 (1995). (CX 10, Tab 3).

Testing, Inc. issued a bulk asbestos analysis report dated March 29, 2001. (JX 5). It contains a handwritten notation of "Callaway Ins.". Analyst Greg Heinecke did not detect the presence of asbestos in that sample.<sup>3</sup>

Claimant worked on ship named the Alpena.<sup>4</sup> (Tr. 29). Using blue prints from the Alpena, Claimant pointed to specific areas on the ship that contained asbestos. (Tr. 30; CX 6). The Alpena, as well as all other vessels of the Alpena's class, used magnesium block to case various areas of the boiler. Claimant testified that magnesium block consists of 80% asbestos. (Tr. 30). Through the mid 1980s, Claimant removed the magnesium block insulation and replaced it with a non-asbestos product on the Alpena and many other ships during his employment. (Tr. 31).

Claimant worked on the Beeghly from 1966 until he left Employer in 2002. (Tr. 35). He could not recall when he refurbished the Beeghly with non-asbestos materials. (Tr. 36). There is still asbestos containing material on the Alpena, which he last worked on in 2001, but he removed some asbestos in the early to mid 1980s. (Tr. 36). Three sister vessels, Clark, Calloway, and Anderson, continue to have asbestos materials onboard in certain areas, but Claimant took care not to go near those areas in 2002. (Tr. 38). Claimant was onboard the Presque Isle during 2002, which contains some asbestos. (Tr. 39). However, Claimant was aware of the asbestos and handled the situation with great care. (Tr. 39). He was aboard the Clark in February 2001, the Beeghly and Munson in January 2001, and the Lee Travertha in March 2000. (Tr. 51). He may have been aboard the Clark in March 2000, and he remembers being aboard the Munson and Presque Isle in February 2000. (Tr. 51). He also recalls being aboard the K.E. Barker in November 1999. (Tr. 52).

EnviroBate maintained daily time logs describing the work they performed for Employer. (JX 9). There are numerous notations stating that Larry or Larry Shimmin pointed out the areas on the ship for asbestos removal. After the materials were pointed out, employees of EnviroBate removed the materials with glove-bags. The earliest date record from EnviroBate mentioning Larry is November 9, 1999, and the latest date is April 2, 2002.

## Responsible Carrier

It is undisputed that Claimant's exposure to asbestos while in the course of employment covered under the Act caused his mesothelioma. Thus, the issue is the identity of the carrier responsible for the payment of compensation under the Act. In order to determine carrier liability

<sup>&</sup>lt;sup>3</sup>Envirobate's Daily Time Logs show that a substantial amount of glove-bags, which carried materials suspected of containing asbestos, were removed from the Calloway between February and March of 2001. Alan Rivord, Claimant's supervisor, testified that there are times where the owners of the ships keep the asbestos analysis reports from Twin Ports Testing, Inc.. (Tr. 60, 61). Accordingly, the one negative analysis report from March 29, 2001 does not affirmatively establish the absence of asbestos on the Calloway at that time.

<sup>&</sup>lt;sup>4</sup>In the hearing transcript the ship Alpena is misspelled "El Pina", the Beeghly is misspelled "Bigley", the Munson is misspelled "Munsilin", the Presque Isle is misspelled "Tresque Isle", and the Lee Tregurtha is misspelled "Lee Travertha". *See* JX 10.

in occupational disease cases involving successive carriers, the courts and the Board have uniformly applied the last employer rule enunciated in *Travelers Insurance Co v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955). *See, e.g., Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 16 BRBS 13 (CRT)(9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984); *Jacksonville Shipyards, Inc. v. Director, OWCP*, 851F.2d 1314, 21 BRBS 150(CRT)(11th Cir. 1988). The Board's current formulation of *Cardillo* holds that:

[T]he responsible operator is the employer during the last employment where claimant was exposed to injurious stimuli prior to the date on which claimant was aware or should have been aware of the relationship between his disability, disease and his employment. . . . Claimant cannot be held to be aware of the relationship between his occupational disease, employment and disability prior to the date he became disabled.

See Carver v. Ingall's Shipbuilding, Inc., 24 BRBS 243, 246-7 (1991). While a physician's diagnosis is not required for finding of awareness, it does establish the latest date by which a claimant should have been aware of the work-relatedness of his condition. See Todd v. Todd Shipyards Corp., 16 BRBS 163, 166 (1984).

A distinct aggravation of an injury need not occur for an employer to be held liable as the responsible employer; rather exposure to potentially injurious stimuli is all that is required under the Cardillo standard. See Ibos v. New Orleans Stevedores, 35 BRBS 50 (2001); Lustig v. Todd Pacific Shipyards Corp., 20 BRBS 207 (1988), aff'd in pert. part and rev'd in part sub nom. Lustig v. U.S. Dept. of Labor, 881 F.2d 593, 22 BRBS 159 (CRT)(9th Cir. 1989). In order to meet its burden of establishing that it is not the responsible employer, an employer must prove either that the employee's exposure while working for employer was not injurious or that the employee was exposed to injurious stimuli while working for a subsequent employer covered under the Act. See Norfolk Shipbuilding & Drydock v. Faulk, 228 F.3d 378, 384, 34 BRBS 71, 75(CRT) (4th Cir. 2000), cert. denied, 121 S.Ct. 855; Avondale Industries, Inc. v. Director, OWCP [Cuevas], 977 F.2d 186, 190, 26 BRBS 111, 113(CRT); see also General Ship Service v. Director, OWCP [Barnes], 938 F.2d 960, 25 BRBS 22(CRT) (9th Cir. 1991). An injurious exposure is one which had the potential to cause the disease or harm at issue. See Faulk, 228 F.3d at 385, 34 BRBS at 75(CRT); Cuevas, 977 F.2d at 190, 26 BRBS at 113(CRT); see also Ibos, 35 BRBS at 53. These tribunals rejected the latency period argument.<sup>5</sup> See Lustig, 20 BRBS at 213; Ibos, 35 BRBS 50; see also Perry v. Jacksonville Shipyards, 18 BRBS 219, 222 (1986).

The responsible carrier is the one who was providing coverage when Claimant was last injuriously exposed to asbestos prior to his awareness of the relationship between his disability, disease, and employment. Claimant began experiencing shortness of breath February of 2001. He was admitted to the hospital on August 30, 2001 for treatment of his collapsed lung. On September 4, 2001, he returned to work. Claimant was readmitted to the hospital two days later

<sup>&</sup>lt;sup>5</sup>The latency period argument relies on medical opinion evidence to advance the theory that exposure after the initial exposure and during an indefinite latency period is not injurious. *See* the depositions of Drs. Boylan and Kirschling, and the reports of Drs. Jones, Durio and Gee. (JX 2, 3; R2 EX 2, 7; Signal EX 3).

on September 6, 2001. Claimant was definitively diagnosed with mesothelioma caused by exposure to asbestos on September 20, 2001. He did not return to work until October 5, 2001. I find that Claimant became aware of his disability on September 6, 2001. I further find that Claimant became aware of the relationship between his mesothelioma and employment on September 20, 2001. Thus, the responsible carrier is the carrier on the risk when Claimant was last exposed to asbestos that had the potential to cause mesothelioma prior to September 6, 2001.

Claimant has sufficiently documented a long history of employment related to asbestos, beginning in 1973 and lasting throughout his employment. I find Claimant's testimony to be credible. His demeanor evinced and honest forthright attempt to accurately recall his history of exposure in relation to the numerous ships on which he worked over the course of his employment. He testified that his last exposure to asbestos was in April of 2001 on the Calloway. Envirobate records show a substantial amount of work performed on the Calloway between February and April of 2001. Envirobate removed a substantial amount of material from the Calloway over those three months. Claimant recalls wearing a mask when he boarded the Calloway to show the representative from Envirobate the suspect area. The Daily Time Logs from Envirobate show that Claimant made multiple trips to the Calloway during that time period. Claimant also testified that he did wear respiratory protection every time he boarded a ship. The record does not demonstrate that wearing a mask or respirator prevents a person from being exposed to asbestos. Lawrence Durio, an industrial hygienist whose professional opinion regarding the appropriateness of Employer's respirators was adduced by AIG, did not opine that respiratory protection prevents exposure to asbestos.<sup>6</sup> (AX 7). Claimant did not wear protective clothing when he boarded ships. Ostensibly, a mask or respirator only prevented Claimant from inhaling asbestos fibers while present at the area thought to contain asbestos. Later, if Claimant removed his mask or respirator, he could have inhaled asbestos fibers that were present on his clothing. I find that Claimant was last injuriously exposed to asbestos, prior to his awareness of the relationship between his disability, disease, and employment, in April of 2001. AIG was the carrier providing Employer with workers' compensation insurance for the period covering April of 2001. Therefore, I find that AIG is the responsible carrier.

#### Reimbursement of Expenses

Travelers requested reimbursement for indemnity and medical benefits, including reimbursement of traveling expenses, all of which Travelers voluntarily paid pending resolution of the responsible carrier issue. (Travelers' Post-Trial Brief, p. 8). Travelers submitted an untitled document in the form of a financial detail inquiry dated September 23, 2002. (TX 1). The date of loss is listed as May 30, 1996. The document indicates that Travelers paid bi-weekly temporary total disability compensation to Claimant, beginning on May 28, 2002 and continuing through the hearing, in the amount of \$1,527.66. Travelers paid \$15,276.60 in temporary total disability compensation to Claimant. Travelers also paid medical expenses on behalf of Claimant in the

<sup>&</sup>lt;sup>6</sup>Mr. Durio submitted a report dated August 29, 2002. (AX 7). He opined that the respiratory protection that Fraser provided to its employees was appropriate for use against airborne asbestos fibers if the airborne asbestos fiber concentrations were within the limitations of the respiratory protection and the person wearing the equipment was properly trained and fitted to ensure that they actually received the protection the respiratory device was designed to provide.

amount of \$12,622.06. The record does not contain evidence regarding the payment of travel expenses. In light of correspondence received while this matter was *sub judice*, which indicated that Travelers has continued to pay Claimant's compensation and expenses, Travelers is hereby allowed a period of 30 days to submit an itemized listing of all benefits paid to or on behalf of Claimant in relation to his occupational disease of mesothelioma. The listing must be accompanied by a service sheet showing that service has been made upon all parties, including the Claimant and the Solicitor as counsel for the Director. Parties shall then have 10 days, following the receipt of any such listing, within which to file objections.

### **Attorney Fees**

No award of attorney's fees for service to the Claimant is made herein because no application has been received from counsel. A period of 30 days is hereby allowed for the Claimant's counsel to submit an application. The application must conform to 20 C.F.R. § 702.132, which set forth the criteria on which the request will be considered. The application must be accompanied by a service sheet showing that service has been made upon all parties, including the Claimant and Solicitor as counsel for the Director. Parties so served shall have 10 days following receipt of any such application within which to file their objections. Counsel is forbidden by law to charge the Claimant any fee in the absence of the approval of such application.

### **Entitlement**

The parties agreed to confine the issue for determination in this matter to the identity of the carrier responsible for paying benefits. The evidence in the record supports the conclusion that Claimant, Larry Shimmin, was last injuriously exposed to asbestos, prior to his awareness of the relationship between his disability, disease, and employment in April of 2001. AIG was the carrier who provided Employer, Fraser Shipyards, with workers' compensation insurance for the time period encompassing April of 2001. Therefore, I find that AIG is the carrier responsible for paying benefits to Claimant.

#### **ORDER**

Based on the Findings of Fact and Conclusions of Law expressed herein, as well as the record as a whole, I issue the following compensation order. It is THEREFORE ORDERED that:

1. American International Specialty Lines Insurance Company is the carrier responsible for compensating Claimant for his occupational disease of mesothelioma, which arose out of and in the course of his employment with Fraser Shipyards. American International Specialty Lines Insurance Company provided workers' compensation coverage to Fraser Shipyards during April of 2001, which was the time of Claimant's last injurious exposure to asbestos before Claimant became aware of the relationship between his disability, disease, and his employment on September 20, 2001.

- 2. American International Specialty Lines Insurance Company shall reimburse Travelers Property and Casualty Corporation for all compensation and benefits paid to Claimant, which are related to Claimant's occupational disease, mesothelioma. Travelers Property and Casualty Corporation shall file, within thirty days of receipt of this Decision and Order, a fully supported and fully itemized petition for reimbursement, sending a copy thereof to counsel for all parties, who shall then have ten days to file objections.
- 3. The Claimant's attorney shall file, within thirty days of receipt of this Decision and Order, a fully supported and fully itemized fee petition, sending a copy thereof to Employer's counsel who shall have ten days to file objections. 20 C.F.R. § 702.132.

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THOMAS F. PHALEN, JR. Administrative Law Judge